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## Putting 1992 in Perspective

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# **SYMPOSIUM**

## **1992: DOING BUSINESS IN THE EUROPEAN INTERNAL MARKET**

### **Putting “1992” in Perspective**

*Mark L. Jones\**

The United States has vital economic, political and military stakes in the twelve member nations of the European Community (“EC” or “Community”).<sup>1</sup> A review of the 1987 statistics regarding United States exports and United States foreign direct investment demonstrates the continued economic importance of the EC nations for the United States.<sup>2</sup>

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<sup>1</sup> The six original Member States of the European Community were Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. They were joined by Denmark, Ireland and the United Kingdom on January 1, 1973, by Greece on January 1, 1981, and by Spain and Portugal on January 1, 1986. Although not formally Member States, numerous other countries are economically linked to the European Community through an extensive network of trade and association agreements.

<sup>2</sup> In 1987, for example, United States merchandise exports to the EC countries amounted to \$60.6 billion, which represented 24% of total United States merchandise exports. Although it is more difficult to measure service exports, official statistics compiled by the United States Department of Commerce indicate that there were \$17.5 billion of service exports, accounting for 29% of total United States exports of services. In 1987 also, United States direct investment in the European Community amounted to \$122 billion, representing 40% of total United States foreign investment. M. CALINGAERT, *THE 1992 CHALLENGE FROM EUROPE: DEVELOPMENT OF THE EUROPEAN COMMUNITY'S INTERNAL MARKET*, 77-79, 131-34 (1988). Statistics given in this study covering the period since the 1960s reveal a steady increase in all three areas.

The Community is currently carrying out an ambitious program to complete the EC "Internal Market" by 1992. This program calls for the Community to adopt almost 300 legislative measures aimed at eliminating the remaining barriers to the free movement of goods, persons, services and capital between the Member States. The Community's Internal Market program has significant implications for United States interests in Europe. In particular, it creates an important new challenge, presenting both opportunities and risks, for business interests in the United States and in other countries.

Many important aspects of the Internal Market program are explored in the contributions to this Symposium. The purpose of this Article is to put the Community's 1992 Project in perspective. Part I provides some general background information on the European Community and an overview of the Treaty Establishing the European Economic Community ("EEC Treaty")<sup>3</sup> Following a discussion in Part II of various obstacles impeding economic integration in the Community before the mid-1980s, Part III describes the subsequent relaunching of the Community which has taken place in particular as a result of the Commission's Internal Market initiative and the reforms effected by the Single European Act. Part IV examines the progress made to date, as well as various problems, actual and potential, in the implementation of the Internal Market program. Part V considers the implications of "1992" for the United States and United States business interests.

## I. THE EUROPEAN COMMUNITY

### A. The Three European Communities

The European Community in fact consists of three separate Communities, each governed by its own Treaty. The EEC Treaty provides for the establishment of a general common market and is by far the most important and far reaching. It was signed in Rome on March 25, 1957, and entered into force on January 1, 1958. The EEC Treaty was preceded by an earlier Treaty, and accompanied by a further Treaty, both of which provided for economic integration in two limited sectors — the Treaty Establishing the European Coal And Steel Community ("ECSC Treaty"), signed in Paris on April 18, 1951, and the Treaty Establishing the European Atomic Energy Community ("EURATOM Treaty"), also signed in Rome on May 25, 1957.<sup>4</sup> Although there are technically three

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<sup>3</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

<sup>4</sup> Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar.

separate European Communities, they are known collectively as the European Communities (or European Community) and are now administered by a unified institutional structure. Many envisaged that the economic integration to be achieved by these three Treaties would be a precursor to eventual political integration.

## B. Overview of the EEC Treaty

This section provides a brief overview of the EEC Treaty, addressing the various substantive areas of Community activity and the Community institutions. The amendments to the EEC Treaty effected by the Single European Act are discussed in Section III.<sup>5</sup>

### 1. *Purposes and Activities of the Community*

Article 2 of the EEC Treaty declares the purposes of the Community and states that they are to be achieved by "establishing a common market and progressively approximating the economic policies of Member States."<sup>6</sup> The various activities to be undertaken by the Community in order to achieve these objectives are addressed in numerous detailed provisions contained in Parts II, III and IV of the Treaty, and many (but not all) are enumerated in Article 3.<sup>7</sup> Some of these activities are directly

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25, 1957, 298 U.N.T.S. 259[hereinafter EURATOM Treaty]. It should be noted that the texts of the Treaties reproduced in the U.N.T.S. are the texts of the original unamended Treaties. There have been a number of amendments over the years. For an authoritative consolidated version of the Treaties as amended see 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (1987).

<sup>5</sup> The 248 articles of the EEC Treaty are divided into six different Parts, with further subdivisions into Titles, Chapters and Sections. For a comprehensive and detailed summary analysis of the provisions of the EEC Treaty, as amended by the Single European Act, see M. Jones, in BASIC DOC. INT'L ECON. L. (CCH) (forthcoming 1989). The summary analysis is accompanied by the text of the Treaty as amended by the Single European Act, other relevant Single European Act provisions and a bibliography.

<sup>6</sup> Article 2 states that:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

EEC Treaty, art. 2, 298 U.N.T.S. at 15.

<sup>7</sup> Article 3 states that:

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the elimination, as between Member states, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
- (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
- (d) the adoption of a common policy in the sphere of agriculture;
- (e) the adoption of a common policy in the sphere of transport;

related to the establishment of the common market while others relate more directly to the approximation of Member States' economic policies.

A "common market" is established essentially by the creation of a customs union, together with the abolition of all restrictions on the movement of the factors of production — labor, capital and enterprise.<sup>8</sup> This concept is reflected in Part II of the EEC Treaty — Foundations of the Community — which contains provisions on the free movement of goods (Arts. 9-37), and on the free movement of persons (Arts. 48-58), services (Arts. 59-66) and capital (Arts. 67-73, 106). The establishment of the common market requires that these "fundamental freedoms" be supported by rules and policies designed to eliminate other restrictions and distortions arising from both governmental measures and private action. The EEC Treaty also contains other provisions, therefore, which deal with anti-competitive behavior by enterprises and state aids by governments (Arts. 85-94), discriminatory or protective internal taxes and the harmonization of legislation governing indirect taxation (Arts. 95-99), the adoption of measures for the approximation of national laws (Arts. 100-102), and the establishment of a common commercial policy (Arts. 110-116).

Two special sectors, agriculture and transport, are characterized by a high degree of government intervention. With respect to these sectors, the establishment of the Common Market requires not merely the abolition of national restrictions on free movement, but also the substitution of a Community-wide policy (Arts. 38-47, 74-84). Provisions which relate more directly to the approximation of Member States' economic policies are contained in Part III of the EEC Treaty, entitled Policy of the Community. Prior to the Single European Act, these included provisions dealing with economic policy (Arts. 103-116), social policy (Arts. 117-128), and the European Investment Bank (Arts. 129, 130).

With regard to external policy, as mentioned above, the EEC Treaty provides for the establishment of a common commercial policy. The

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(f) the institution of a system ensuring that competition in the common market is not distorted;

(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;

(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;

(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;

(j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;

(k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

EEC Treaty, art. 3, 298 U.N.T.S. at 15-16.

<sup>8</sup> F. ROOT, INTERNATIONAL TRADE AND INVESTMENT 341 (1984).

EEC Treaty also gives the Community international legal personality and various express treaty-making powers. Moreover, implied treaty-making powers flowing from Treaty provisions granting internal power have also been recognized. In the exercise of these powers, the Community has concluded a great number of trade and association agreements. The Community also participates in the work of numerous international organizations, including the General Agreement on Tariffs and Trade ("GATT"). Although not formally a member of the GATT, the Community concluded a number of the multilateral trade agreements negotiated during the Tokyo Round and is currently participating in the Uruguay Round of trade negotiations. In addition, a movement towards the joint formulation and implementation by the Member States of a common European foreign policy has evolved since 1970. This movement, the European Political Cooperation, falls outside the scope of the EEC Treaty and is subject to separate procedures and institutional structures.

## *2. Institutional Framework of the Community*

Article 4 of the Treaty states that the tasks of the Community are to be carried out by four institutions — a European Parliament, a Council, a Commission, and a Court of Justice. Although the three European Communities now possess common institutions,<sup>9</sup> these institutions continue to derive their authority from the three separate Treaties.

The seventeen members of the Commission (Arts. 155-163) are appointed every four years by common accord of the governments of the Member States. Acting in the general interest of the Community, the Commissioners must be completely independent in the performance of their duties, and are supported by a bureaucracy of over 11,000 officials. The overall obligation of the Commission is to "ensure the proper functioning and development of the common market" (Art. 155). Specifically, the Commission formulates proposals for Community legislation, enforces Community law against Member States and individuals, and generally acts as the executive arm of the Community.

The Council (Arts. 145-154) consists of representatives of the Member States, and is responsible for "[ensuring] that the objectives set out in this Treaty are attained." In particular, the Council coordinates the gen-

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<sup>9</sup> The common institutions of the Community are the result of: 1) the Convention on Certain Institutions to the European Communities, which was annexed to the EEC and EURATOM Treaties and which provided for a Single Assembly and a single Court of Justice, as well as a Single Economic and Social Committee; and 2) the Treaty Establishing a Single Council and a Single Commission of the European Communities, which was signed on April 8, 1965 and which entered into force on July 1, 1967, 10 I.O. COMM. EUR. (No. 152) 2 (1967).

eral economic policies of the Member States and exercises its power to make decisions (Art.145). This body should be distinguished from the European Council, which consists of Heads of State or Government of the Member States and the President of the Commission, assisted by the Ministers for Foreign Affairs and a member of the Commission. The European Council has evolved since 1974 and acts as a catalyst for further progress by dealing at summit level with matters falling within Community competence as well as other matters, such as European Political Cooperation.

The European Parliament (Arts. 137-144), originally called the Assembly, consists of representatives directly elected by the citizens of the Member States. The 518 members of the European Parliament sit according to political grouping rather than nationality. Despite its name and claim to democratic legitimacy, the Treaty envisages that the Parliament will have an essentially advisory and supervisory role (Art. 137). As a result of amendments to the EEC Treaty made in 1970 and 1975, however, the Parliament now shares formal decision-making authority over the budget with the Council.

The European Court of Justice (Arts. 164-188) consists of thirteen judges, who may form chambers of three to five judges to hear particular categories of cases. The Court is assisted by six impartial and independent Advocates-General whose duty is to make reasoned submissions in cases before the Court. Judges and Advocates-General are appointed by common accord of the Member State governments from highly qualified jurors of indisputable independence. The task of the Court is to "ensure that in the interpretation and application of this Treaty the law is observed" (Art. 164). A number of different actions may be instituted directly before the Court (*i.e.*, the Court has original jurisdiction). These actions include enforcement actions against Member States for failure to fulfill an obligation under the Treaty (Arts. 169-171), and various classes of action against Community institutions, such as actions to annul acts of the Council or the Commission (Arts. 173, 174, and 176), actions to establish failure to act on the part of the Council or the Commission (Arts. 175 and 176), and actions for damages based on non-contractual liability of the Community (Arts. 178, 215, 2d para.). In limited circumstances, individuals may also successfully institute direct actions against the Community institutions in question. In addition, the Court has jurisdiction to give preliminary rulings on the interpretation of the Treaty or on the interpretation or validity of acts of the Community institutions when such actions are referred to it from a national court (Art. 177).

The EEC Treaty is a framework treaty and requires implementation

through the adoption of legislative measures by the Community institutions. Numerous articles throughout the Treaty provide explicit authority for the Community to act, by requiring or authorizing the adoption of legislative measures dealing with specific matters. These measures will usually be in the form of regulations or directives.<sup>10</sup> In the law-making process, the Council is the principal decisionmaking institution, although in most cases it can only act upon a proposal of the Commission and often only after obtaining the Opinion of the European Parliament and sometimes that of the Economic and Social Committee (Arts. 193-198) or other bodies.

## II. OBSTACLES TO INTEGRATION

Although the Community had already achieved significant economic integration by the mid-1980s,<sup>11</sup> the common market was not yet completely established and only faltering steps had been taken toward economic and monetary union.<sup>12</sup> Thus, although the EEC Treaty required that the common market be established by the end of 1969 (Art. 8 and Part II), a wide array of significant barriers to the exercise of the fundamental freedoms remained. Even the free movement of goods had not become a reality.

The causes of this lack of progress were both economic and institu-

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<sup>10</sup> Article 189 enumerates three types of legally binding acts — regulations, directives and decisions — and specifies their differing legal characteristics. It states that:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

EEC Treaty, art. 189, 298 U.N.T.S. at 78-79.

<sup>11</sup> Particular highpoints were the establishment of the common customs tariff 18 months ahead of schedule, i.e., by mid-1968, and adoption of the sixth Value Added Tax (VAT) directive in 1977. However, progress was not only due to the adoption of legislative measures by the Community institutions, but also in significant part to the Court of Justice, which declared the direct effect of various Treaty articles containing obligations relating to the establishment of the common market and of provisions in Community legislation, including directives, adopted to implement and supplement those obligations.

<sup>12</sup> These steps include the establishment in 1979 of the European Monetary System (EMS) and the European Currency Unit (ECU). However, the Treaty provisions relating to economic and monetary affairs are not as clear and precise as those relating to the establishment of the common market. Moreover, some Member States did not participate as fully as others in the economic and monetary coordination that had been achieved. Thus, for example, neither Greece nor the United Kingdom participated in the day-to-day currency management system of the European Monetary System (EMS) which is still the case today (Spain and Portugal also do not participate).



tional. In the economic climate of the 1970s, characterized by oil shocks in 1973-74 and 1978-79, inflationary pressures in the mid-1970s, and the onset of the recession, Member States were often reluctant to agree to the adoption of legislative measures by the Council and thereby to relinquish more national sovereignty. Furthermore, in an effort to protect national markets and industries, Member States increasingly resorted to the use of "non-tariff barriers" and subsidies to aid and maintain non-viable companies.<sup>13</sup> In addition to the obstacles created by the unfavorable economic climate, various institutional impediments stood in the way of further progress. For example, some important Treaty provisions required unanimity for the adoption of certain measures by the Council. Moreover, even where EEC Treaty provisions allowed for qualified majority voting, in practice, the Council invariably required unanimity where "very important interests" of Member States were at stake.<sup>14</sup>

### III. THE RELAUNCHING OF THE COMMUNITY

Since the mid-1980s, however, the Community has experienced a renewed sense of purpose and dynamism. This is primarily the result of three related events: the publication in 1985 of the Commission's White Paper on Completing the Internal Market, the signature in 1986 and entry into force in 1987 of the Single European Act, and the adoption and implementation in 1988 of major financial and budgetary reforms. This section will focus on the White Paper and the Single European Act.<sup>15</sup>

#### A. The Commission's White Paper on Completing the Internal Market

Throughout the first part of the 1980s, the Commission, the Parliament, and business circles in the Community pressed to achieve further progress in establishing a truly integrated market. This pressure was fueled in considerable part by the perception that action was necessary to enable enterprises in the Community to meet increased competition from

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<sup>13</sup> For further discussion, see M. CALINGAERT, *supra* note 2, at 6-7.

<sup>14</sup> This Council voting practice originated in the so-called Luxembourg compromise of 1966. The economic costs of the failure to complete the Internal Market are analyzed in P. CECCHINI, *THE EUROPEAN CHALLENGE 1992* (1988); COMMISSION OF THE EUROPEAN COMMUNITIES, *THE ECONOMICS OF 1992* (1988). See also M. CALINGAERT, *supra* note 2, at 65-70.

<sup>15</sup> Although space does not permit a more detailed discussion of the financial and budgetary reforms effected in 1988, their importance should not be underestimated. The result of these reforms is to: (1) strengthen the financing of the Community by increasing the resources available to it; (2) subject the budget to effective and legally binding discipline, in particular by placing significant limitations on agricultural spending, the major item of Community expenditures; and (3) strengthen the Community's structural funds, in particular so as better to assist economically disadvantaged regions of the Community.

third countries.<sup>16</sup> In its Program for 1985, the Commission announced the objective of achieving a fully unified Internal Market by 1992. The European Council, meeting in Brussels in March 1985, endorsed this objective and called upon the Commission to draw up a detailed program with a specific timetable before its next meeting. This mandate resulted in the publication, in June 1985, of the Commission White Paper on Completing the Internal Market.<sup>17</sup> The European Council endorsed the objectives of the White Paper at its meeting held later that month.

The White Paper described the remaining barriers to completion of the Internal Market, dividing them (perhaps somewhat artificially) into physical, technical and fiscal barriers. The most obvious example of a physical barrier is the continued existence of customs and immigration controls at the frontiers of the Member States. Technical barriers include such obstacles to free movement as differing national products standards adopted to protect health, safety, the environment or consumer protection, differing national requirements relating to professional qualifications or the provision of financial and other services, restrictive rules and procedures in the area of public procurement, restrictions on the movement of capital within the Community, and the absence of a common legal framework on such matters as company law or intellectual and industrial property. Fiscal barriers are the result of differences in the national regimes of indirect taxation.<sup>18</sup>

The White Paper also described the Commission's strategy for the removal of these remaining barriers and an annex to the White Paper contained a detailed timetable for completing the Internal Market by 1992. The annex enumerated and categorized some 300 measures, in each case setting a date for submission of a proposal by the Commission and for adoption by the Council, so that all the required measures could be implemented by the Member States by the 1992 deadline.<sup>19</sup> Although it focused on measures "directly necessary to achieve a single integrated market," the White Paper also acknowledged the linkages between the Internal Market and other areas of Community policy, where further ac-

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<sup>16</sup> See M. CALINGAERT, *supra* note 2, at 7-8.

<sup>17</sup> *Completing the Internal Market: White Paper From the Commission to the European Council*, COM(85)310 final (June 14, 1985)[hereinafter *White Paper*]. Particular credit for this initiative must go to the Commission President Jacques Delors and the British Commissioner responsible for the Internal Market, Lord Cockfield.

<sup>18</sup> See M. CALINGAERT, *supra* note 2, at 20-27 (Calingaert adopts a somewhat different scheme of categorization).

<sup>19</sup> This list also included a few measures that had already been proposed by the Commission. It should be noted that most of the Internal Market measures are in the form of directives, which require transposition into measures of national law. See EEC Treaty, art. 189, 298 U.N.T.S. at 78-79.

tion and progress also was required.<sup>20</sup>

### B. The Single European Act

Following publication of the White Paper, it became evident that the Commission's ambitious work program could only be carried out effectively if institutional changes were made to improve the Community's decision-making process. Pressure for progress towards the ultimate goal of the European Union also increased as the completion of the Union became a more realistic possibility. If these objectives were to be achieved, however, reform of the basic Treaties was necessary, particularly the EEC Treaty.

An Intergovernmental Conference, convened in September 1985, resulted in the negotiation of the Single European Act, which was signed in February 1986 and which entered into force in July 1987 following ratification by all twelve Member States.<sup>21</sup> Even though the Single European Act falls short of more ambitious proposals put forward,<sup>22</sup> it nevertheless represents the most radical revision of the EEC Treaty ever undertaken. It is perceived as a necessary step towards the achievement of a European Union.<sup>23</sup> The various reforms effected by the Single European Act may be categorized as follows.

First, the Single European Act made various amendments to the EEC Treaty directly related to the Internal Market program. It added new provisions to Part One of the Treaty which declare that "[t]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on the 31st of December 1992 . . ." and which state that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."<sup>24</sup> In order to facilitate the adoption of the necessary measures by the Council, the Single European Act amended several Treaty articles

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<sup>20</sup> The White Paper mentioned linkages with research and technological development, coordination of economic policies and the European Monetary System, competition policy, commercial policy, transport, social, environment, and consumer protection policy, and use of the various structural funds. *White Paper*, *supra* note 17, at 7-8.

<sup>21</sup> 30 O.J. EUR. COMM. (No. L 169) 1 (1987). The Single European Act is also reproduced in 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (1987).

<sup>22</sup> *E.g.*, Draft Treaty Establishing the European Union, 27 O.J. EUR. COMM. (No. C 77) 33 (1984).

<sup>23</sup> See Preamble, Considerations 1 and 2, and Art. 1.

<sup>24</sup> Single European Act, arts. 13-15, 30 O.J. EUR. COMM. (No. L 169) at 7 (adding arts. 8a-c to the EEC Treaty). A Declaration adopted by the Intergovernmental Conference referred to the Commission's program in the White Paper but purported to characterize the deadline as a political commitment which "does not create an automatic legal effect." *Id.* at 24.

relevant to the Internal Market to provide for qualified majority voting instead of unanimity.<sup>25</sup> It also imposed more precise obligations with respect to the harmonization of legislation on indirect taxation,<sup>26</sup> and added new provisions making available an improved procedure for the adoption, by qualified majority, of harmonization measures governing the establishment and functioning of some aspects of the Internal Market.<sup>27</sup>

Second, the Single European Act effected other institutional reforms in addition to the provisions for qualified majority voting by the Council. In particular, it amended the EEC Treaty to give more power to the European Parliament. Several Treaty articles now require that the Council act "in cooperation with the European Parliament."<sup>28</sup> Although the final decision still rests with the Council, this somewhat complicated "cooperation procedure" does enhance the influence of the Parliament in the adoption of legislative measures, in those areas where it applies, by giving it the opportunity for a second reading of proposed legislation before the Council can take final action.<sup>29</sup> Other important institutional reforms included a mandate for the Council to confer increased implementing powers on the Commission,<sup>30</sup> authorization of the establishment of a Court of First Instance attached to the Court of Justice to lighten the

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<sup>25</sup> *Id.* art. 16 (amending EEC Treaty, arts. 28, 57(2), 59 2d para, 70(1), 84(2)).

<sup>26</sup> *Id.* art. 17, at 7-8 (replacing EEC Treaty, art. 99).

<sup>27</sup> *Id.* art. 18, at 8 (adding art. 100a to the EEC Treaty). The areas excepted relate to fiscal provisions, the free movement of persons and the rights and interests of employed persons. *See also id.* art. 19 (adding art. 100b to the EEC Treaty)(provides that, before the end of 1992, the Council may apply the principle of equivalence to those national measures which remain unharmonized). It should be noted that the Internal Market provisions of the Treaty, as amended by the Single European Act, still allow for possible exceptions and derogations to free movement. *See, e.g., id.* arts. 8c, 36, 100a(4)-(5), at 7, 8. Moreover, a Declaration adopted by the Intergovernmental Conference purportedly preserved the right of Member States to "take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques," although the Member States undertake, in another Declaration, to cooperate in such matters. *Id.* at 25-26.

<sup>28</sup> *Id.* arts. 6, 18, 19, 21, 23, 24, at 5, 8-11 (EEC Treaty, arts. 7, 49, 54(2), 56(2) 2d sentence, 57 with the exception of the 2d sentence of paragraph 2, 100a, 100b, 118a, 130e and 130(q)(2)).

<sup>29</sup> *Id.* art. 7, at 5-6 (amending EEC Treaty, art. 149). The details of the procedure are beyond the scope of this article. Briefly described, however, after obtaining the Opinion of the European Parliament, the Council may adopt a "common position," acting by a qualified majority, and the Parliament is then given an opportunity to respond before the Council can take final action. Sometimes, indeed, depending upon the response of the Parliament, the Council may only be able to take such final action by unanimity. Time limits are imposed for the various stages in the cooperation procedure. The Single European Act also makes Parliamentary assent necessary for the accession of new Member State, *Id.* art. 8, at 6 (amending EEC Treaty art. 237) and for the conclusion of association agreements, *Id.* art. 9, at 6 (amending EEC Treaty art. 238).

<sup>30</sup> *Id.* art. 10, at 6 (adding art. 145, 3d indent to the EEC Treaty).

Court's ever-increasing case load,<sup>31</sup> and the formal institutionalization of the European Council.<sup>32</sup>

Third, the Single European Act added provisions to the EEC Treaty which deal with a number of areas that were either not included or only inadequately addressed in the original Treaty. It thereby provides the Community with an explicit and firm basis for its activities in those areas.<sup>33</sup>

Finally, the Single European Act contains provisions which "confirm and supplement" the procedures and practices governing European Political Cooperation.<sup>34</sup> Since they do not amend the basic Treaties, however, these provisions have the status of a separate international agreement between the Member States.

#### IV. IMPLEMENTATION OF THE INTERNAL MARKET PROGRAM: PROGRESS AND PROBLEMS

Although implementation of the Internal Market program presents a continually moving target, this section discusses the progress made by the end of 1988 as well as various problems, both actual and potential, involved in implementing the program.

In November 1988, the Commission adopted a mid-term progress report on the Internal Market program.<sup>35</sup> The report noted that the 300 proposals in the original White Paper had been reduced to 279 by eliminating a few proposals no longer required, grouping others, and adding a small number of new proposals. The report also noted that the Commission expected to meet its target of introducing 90% of the proposals by the end of 1988. Although the Council's progress was not as impressive,

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<sup>31</sup> *Id.* arts. 4, 11, 26, at 4-6, 12 (adding art. 32d of the ECSC Treaty, art. 168a of the EEC Treaty, art. 140a of the EURATOM Treaty).

<sup>32</sup> *Id.* art. 2, at 4.

<sup>33</sup> *See id.* arts. 20-25, at 8-12. These provisions: (1) supplement the existing EEC Treaty articles which deal with economic policy and social policy (adding Arts. 102a (economic and monetary union), 118a (health and safety of workers), 118b (dialogue between management and labor) to the EEC Treaty) and (2) add EEC Treaty articles to deal with three areas that were not included in the original Treaty (adding Arts. 130a-130e (economic and social cohesion), 130f-130q (research and technological development), 130r-130t (environment) to the EEC Treaty). The Commission has described the effect of these provisions as follows:

The Single European Act commits the Community to attaining six objectives: completion of a large frontier-free market; increased economic and social cohesion; a common scientific and technological development policy; further development of the European Monetary System; the emergence of a European social dimension; and coordinated action on the environment. These clear-cut trends combine to make a comprehensive plan that the Preamble to the Single European Act links to the ultimate goal of the European Union.

*Programme of the Commission for 1988*, BULL. EUR. COMM., Supp. 1/88 at 19 (1988).

<sup>34</sup> *See* Single European Act, 30 O.J. EUR. COMM. (No. L 169) art. 1, art. 30, at 4, 13-14.

<sup>35</sup> COM(88)650 final (Nov. 17, 1988).

the situation was nevertheless improved due to the council's increasing of the qualified majority voting procedures provided for by the Single European Act. The report reviewed the progress made in various individual sectors, finding that good progress had been made on eliminating technical barriers. Progress in eliminating physical and fiscal barriers had been less satisfactory, however. Moreover, the Council was not making sufficient use of the Single European Act mandate to confer implementing powers on the Commission. Despite these difficulties, the report concluded that progress towards completing the Internal Market was nevertheless "irreversible."

The Community has clearly made significant progress in adopting measures for completion of the Internal Market.<sup>36</sup> It also seems clear that the Commission's proposals in some crucial areas have encountered significant political opposition.<sup>37</sup> The European Council, meeting in December 1988, noted the determination of the Community to meet the 1992 deadline, and agreed that the pace of work should be stepped up in the future. In particular, it urgently appealed to the Council to increase its efforts in all areas where progress had not been as rapid.<sup>38</sup> It remains to be seen, however, how the Member States in the Council will respond.

Although it is difficult to predict whether the Community will meet its 1992 deadline, two general observations may be made. First, although failure by the Council to adopt some of the Internal Market measures in time (or indeed at all) would diminish the overall impact of the program, those measures already adopted will radically alter the economic and legal environment in which firms do business in the Community after

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<sup>36</sup> In presenting its Programme for 1989 to the European Parliament on January 17, 1989, the Commission stated that as of December 31, 1988, it had submitted 230 of its proposals, of which the Council had adopted 109; additionally, the Council had adopted 5 further proposals and had adopted a common position on 16 others. 70% of the proposals adopted by the Council relate to the technical barriers chapter of the White Paper, and include important measures in such areas as: non-life insurance, banking, the liberalization of short-term capital movements between Member States (thus, in effect, bringing about complete liberalization of capital movements), public supplies, public works, mutual recognition of professional qualifications, maritime and air transport, and the abolition of road haulage quotas. *Programme of the Commission for 1989*, BULL. EUR. COMM., Supp. 1/89 (forthcoming 1989).

<sup>37</sup> For example, in its mid-term report, the Commission called for new attitudes and new instructions regarding fiscal matters, animal and plant health question, and the free movement of persons. COM(88)650 final (Nov. 17, 1988) at 7-8.

<sup>38</sup> Particularly transport, energy, animal and plant health controls, the free movement of persons, and the approximation of taxation. The European Council also urged the Council rapidly to complete the adoption of measures in the priority areas which the European Council had identified at its meeting in June 1988, i.e. public contracts, banking and financial services, the approximation of technical standards and intellectual property. For the text of the "Conclusions" of the European Council, see EUR. COMM. OFF. PRESS & PUB. AFF., EUR. COMM. NEWS, No. 32/88.

1992.<sup>39</sup> Second, whether or not the Council meets its deadline for adoption of measures, the success of the Internal Market program is ultimately dependent upon proper implementation of those measures by the national authorities of Member States, whose past record in this regard is less than satisfactory.<sup>40</sup> This aspect of the Internal Market project should also be carefully monitored, therefore, and could result in a significant increase in the Commission's monitoring and enforcement activities and in the work-load of the Court of Justice.<sup>41</sup>

#### V. IMPLICATIONS OF "1992" FOR THE UNITED STATES AND FOR UNITED STATES BUSINESS INTERESTS

It is vital for United States business interests (and their legal advisers) to pay close attention to the Community's Internal Market program. The elimination of physical, technical and fiscal barriers to free movement, and the resulting increase in economic growth in the Community, will clearly present opportunities for United States firms which export to, or invest in, the countries of the European Community. However, the Internal Market program also creates risks for United States business interests, since Community firms will be more competitive, both within the Community itself and in other markets. In addition, the United States and other countries are increasingly concerned that the Community might become more "protectionist" in the course of completing the Internal Market. This concern has been fueled in particular by the Community's emphasis on obtaining "reciprocity" in certain sectors, such as banking and some areas of public procurement. The Community has

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<sup>39</sup> At its December 1988 meeting, the European Council noted that:  
the process of completing the internal market has already created a new dynamism in the European economy by contributing to economic adjustment and an increase in growth rates.

*Id.* at 2.

Among the economic benefits of creating a single integrated market identified by the Cecchini study, *supra* note 14, are increased opportunities for growth, job creation, economies of scale, improved productivity and profitability, healthier competition, professional and business mobility, stable prices and greater consumer choice. The study has been criticized, however, for not adequately addressing the impact of unrestrained competition, uncontrolled market forces, and wholesale deregulation upon vulnerable industries, companies, regions, and communities. See review by A. Jones in XXVII J. of Comm. Mkt. Studies 85 (1988).

<sup>40</sup> See A. Phillip, Implementing the Internal Market: Problems and Prospects, Royal Institute of International Affairs Discussion Paper No. 5 (1988)(on file in the offices of NW. J. INT'L L. & BUS.). See also COM(88)650 final (Nov. 17, 1988) at 11-12 (point 23 of the Commission's mid-term report). As already noted, most of the Internal Market measures are in the form of directives, which in any event require transposition into provisions of national law. See *supra* note 19. Experience demonstrates that adoption of a directive by the Council is no guarantee that it will be correctly implemented by all the Member States.

<sup>41</sup> See also M. CALINGAERT, *supra* note 2, at 29-63, for further discussion of progress made, problems encountered and future prospects. That discussion is based on the situation existing in mid-1988.

sought to reassure other countries, however, declaring that it will be a "partner" and not a "Fortress Europe."

A recent study concludes that United States firms presently or potentially doing business in the Community should take three main steps in preparation for 1992: 1) gather information; 2) review and develop strategies in the light of their own individual situation; and 3) seek to influence the Community decision-making process.<sup>42</sup> The same study also attempts to identify the most significant issues for United States exporters and United States investors. United States exporters will be particularly affected by the phasing out of Member State import quotas, especially in the areas of textiles and automobiles, or by their transformation into Community quotas. Although less likely, developments in Community anti-dumping policy could also have an adverse effect. Areas of particular concern for United States investors include: possible exceptions to the principle of national treatment for United States firms established in the Community, application of the concept of "reciprocity" (particularly in the services area), the potential use of rules of origin directed against assembly operations, and various social policy elements in the Internal Market program, such as worker participation in company management, and health and safety standards. Finally, both United States exporters and investors will be particularly affected by Community action on product regulations and standards (including testing and certification procedures) and public procurement.<sup>43</sup>

In addition to paying close attention to matters which are directly related to the adoption of the Internal Market measures, the United States government and United States business interests should also think "beyond 1992." This is not just a question of considering possible developments, before and after 1992, relating to the proper implementation of the Internal Market measures by the Member States, or their adjustment

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<sup>42</sup> M. CALINGAERT, *supra* note 2, at 99-101. In order to assist United States business, the United States Department of Commerce has established a special 1992 information service, to provide information, copies of legislation, and assistance regarding specific opportunities or potential problems, at the following address: Single Internal Market: 1992 Information Service, Office of European Community Affairs, U.S. Department of Commerce, Room 3036, Fourteenth and Constitution Avenue, N.W., Washington, D.C. 20230; tel: (202) 377-5276. For a discussion of some other initiatives currently being considered by the United States Administration and the current efforts of United States business interests and others to prepare for 1992 see 285 EUROPE, 16-17, 34 (Apr. 1989). The 1992 Project is resulting in significantly increased United States direct investment in the Community as United States companies acquire European firms or enter joint ventures with them, *Id.* at 24-25.

<sup>43</sup> *Id.* at 82-94. As well as addressing the most significant issues for United States firms in general, the study also examines the particular situation of United States firms in certain specific sectors, *i.e.*, automobiles, banks, insurance, medical devices, pharmaceuticals, and telecommunications. *Id.* at 102-18.



in the light of experience or changed conditions. An assessment of the broader implications of the 1992 Project is also necessary.

First, the Internal Market project is linked to and gives momentum to continuing developments in the other areas of Community activity which are addressed in the Treaty, as amended by the Single European Act.<sup>44</sup> The new Commission appointed in December 1988<sup>45</sup> will also push for progress in these areas<sup>46</sup> (such as economic and monetary unification, and social policy), which will further significantly affect the economic and legal environment in which United States firms do business in Europe.<sup>47</sup> The importance of achieving such progress was also re-emphasized by the European Council at its meeting in December 1988.

Second, progress towards an economic and monetary union may require further institutional reforms. Following the direct elections to be held in June 1989, the European Parliament can also be expected to press for such reforms and to renew its demands for increased powers. The European Parliament may even prepare a new draft proposal for European Union before the 1992 deadline.

Third, "1992" has led to renewed interest in the Community from the remaining non-member countries in Europe, particularly the members of the European Free Trade Association ("EFTA") — Austria, Finland, Iceland, Norway, Sweden and Switzerland — and will probably result in further enlargement of the Community.<sup>48</sup>

Finally, the new era in the development of the Community will also affect US-EC relations in the international arena. For example, the Internal Market program is already having repercussions on negotiations in the GATT Uruguay Round of multilateral trade negotiations, which is scheduled for completion in 1990 and which deals with some of the same areas, such as services. Furthermore, United States economic, political,

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<sup>44</sup> See *supra* note 33.

<sup>45</sup> Several members of the Commission were reappointed, including Commission President Jacques Delors.

<sup>46</sup> See *Programme of the Commission for 1989*, BULL. EUR. COMM., Supp. 1/89 (forthcoming 1989).

<sup>47</sup> A committee, chaired by Commission President Delors, is currently examining ways of achieving economic and monetary union and will report to the European Council before its meeting in June 1989. The report is expected to address the operation and improvement of the EMS and the possible establishment of a common currency and creation of an EC central bank. The concept of a "People's Europe" is also being stressed, in part to offset any perception among the public that the 1992 process is just concerned with economics and that the Community is a "technological machine".

<sup>48</sup> Turkey has already made a formal application for membership. The Community has stated that it will not invite any further applications until at least 1992. The Community is currently negotiating with the EFTA Countries, however, regarding the establishment of a "European Economic Space."

and perhaps even military, interests will be affected by the increased stature and confidence of the European Community in the international community. In this regard, it is significant that the Community's 1992 Project coincides with a new era in East-West relations and that the Community finally established a formal relationship with the Eastern bloc Council of Mutual Economic Assistance ("CMEA" or "COMECON") in June 1988.<sup>49</sup> Following this event, the Community concluded trade agreements with Hungary and Czechoslovakia, and is currently exploring the possibility of similar agreements with other East European countries as well as the Soviet Union.

## VI. CONCLUSIONS

The European Community has just passed the half-way point in its project to eliminate the remaining physical, technical and fiscal barriers which have impeded the full establishment of the common market envisaged in the EEC Treaty. By the end of 1988, the Commission had already submitted 90% of its proposals for the measures it considers necessary to complete the Internal Market by 1992, and the Council had adopted almost one-third of those proposals. The 1992 process is clearly recognized as "irreversible" and has injected a new dynamism and mood of optimism into the Community. Completion of the Internal Market, and the adoption by the Community of measures in the other areas linked to the Internal Market, will radically alter the economic and legal environment in which business is conducted in the twelve Member States of the Community. It is crucial, therefore, that United States firms doing business in those countries and their legal advisers, become fully aware of these important developments and that these firms then take the appropriate steps in the light of their individual situation. It is hoped that, by examining several of these developments in depth, this Symposium will assist in this task by contributing to an increased understanding and awareness of these very complex and significant events currently taking place in the European Community.<sup>50</sup>

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<sup>49</sup> See W. Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. & BUS. 213 (1988).

<sup>50</sup> For a very recent and extremely useful and practical guide, which gives a more comprehensive treatment of the many aspects of the 1992 Project, but a less in-depth treatment of specific topics, and which has come to the author's attention as this article goes to press, see THE CCH GUIDE TO 1993: CHANGES IN EEC LAW (CCH) (1989). The (CCH GUIDE) (1) discusses the Commission's strategy for the removal of the physical, technical and fiscal barriers to free movement; (2) examines the political and economic reasons for completion of the internal market; (3) describes the Community's institutions and law-making process; (4) summarizes the principal measures of general application and the principal measures affecting specific sectors adopted or proposed by the end of 1988; and (5) assesses the opportunities and risks for EC, EFTA and non-European companies.